No. 12902

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA,

Libelant-Appellant,

v.

MATSON NAVIGATION COMPANY, a Corporation; W. R. ECKHART, TUG LOUIE III, Her Boilers, Engines, Tackle, Apparel, Furniture, etc., and WESTPORT TOWBOAT COMPANY, a Corporation,

Appellees.

On Appeal from the United States District Court for the District of Oregon.

APPELLEES' BRIEF

GUNTHER F. KRAUSE,
Proctor for Matson Navigation Company;
ARTHUR S. VOSBURG,
FRANK McK. BOSCH,
Proctors for W. R. Eckhart;
F. E. WAGNER,
Proctor for Westport Towboat Company and Tug Louie III, Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3–52

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APPELLEES' BRIEF

STATEMENT

It is felt that a more comprehensive statement of the case as disclosed by the record would clarify the issues and correctly delineate the questions before this court on appeal.

The appellant United States of America, hereinafter referred to as United States, is owner of the dredge Mult-

nomah. It also owns and maintains a certain dike or jetty constructed of piling extending northerly from the Oregon shore in the lower Columbia River near Westport Bar. Appellee Matson Navigation Company, hereinafter referred to as Matson, was operator of the SS HARDY which at the time of the occurrence involved in this appeal was being piloted by appellee Eckhart, a Columbia River Pilot. Westport Towboat Company, hereinafter referred to as Westport, is owner and claimant of Tug LOUIS III, both likewise appellees herein.

In the early evening of December 21, 1946, appellant's dredge was at anchor in the channel of the Columbia River in the vicinity of Westport, Ore. Shortly before 6:30 P.M. Wesport's Tug with raft in tow was proceeding downstream and allegedly, while proceeding on the course which it followed, failed to clear the dredge and with its tow fouled the dredge, the donkey scow and pipeline. At the time of or shortly after this occurrence, the SS HARDY, with the respondent Eckhart at the conn as pilot, proceeded on a course likewise downstream in the channel attempting to pass dredge, tug and tow and in doing so collided with the dike.

To recover damages and penalties the appellant filed its libel in admiralty in the U. S. District Court for the District of Oregon.

The libel contains two counts, and joins as respondents in personam in both counts Matson, the Pilot and Westport, together with the Tug LOUIS III in rem.

The first count of the libel asserts that the collision between the tug and dredge was due to the fault of the

tug and that the collision between the SS HARDY and the dike was proximately caused by the joint negligence and fault of all the named respondents including the tug.

The libel asserts damages to the dike at $7,567.50 and damages to the dredge and scow at $600.45.

The second count of the libel is based on the Rivers & Harbors Act of 1899, a penal statute, 33 U.S.C. 408-412. This count is void of any charge of wilfulness, neglect or fault, either several or joint but describes two separate and distinct collisions, one between the tug and the dredge and the other between the SS HARDY and the dike.

The libel concludes with a prayer for relief including damages to the dike, damages to the dredge and penalties by decree against all of the named respondents, including the tug.

In accord with the prayer of the libel, the Tug LOUIS III was arrested and later was released on stipulation in the sum of $10,000.00. The SS HARDY was not arrested.

Subsequent to the release of the tug to claimant, exceptions to the libel were filed by all respondents (R. 16-20). Thereafter, a preliminary Pre-trial Order was made and approved (R. 20-26) confining the issues substantially to those raised by exception. Hearing was had resulting in the opinion of the court followed by formal order which decreed first that the Admiralty Extension Act of June 19, 1948 had no retroactive application, that the court sitting in admiralty had no jurisdiction of the tort resulting in damages to the dike, that the court sitting in admiralty had no jurisdiction to entertain the claim for penalties under the Act of 1899, dismissed the libel as to

respondents Matson and Eckhart and also dismissed the libel as to the claimant Westport and Tug LOUIE III insofar as damages to the dike were concerned and finally allowed libelant 20 days to amend its libel confining its claim to the damage to the dredge and its equipment.

Appellant in its brief urges that the Admiralty Extension Act is to be retroactively construed and further, that the same Act is to be construed in such manner as to give admiralty jurisdiction of the penal provisions of the Rivers and Harbors Act of 1899. Appellant also urges the constitutionality of both acts.

A review of the record will disclose that the lower court made no determination as to the validity of the Admiralty Extension Act of June 19, 1948 (46 U.S.C.A. §740) nor did the court make any determination as to the constitutionality or validity of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §412).

POINTS RELIED UPON BY APPELLEES

Briefly stated, the position of all appellees on this appeal is:

(1) The Admiralty Extension Act of June 19, 1948 (46 U.S.C.A. §740) is to be prospectively construed and has no retroactive application.

(2) Prior to the effective date of the Admiralty Extension Act the jurisdiction of admiralty did not extend to the penalty provisions of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §407-412), insofar as shore structures are concerned.

(3) An action in tort for negligent navigation cannot be joined with an action to recover the penalty as attempted in this proceeding.

(4) In the absence of wilfullness, no action to recover penalty in personam lies under the provisions of the Rivers and Harbors Act of 1899.

(5) No action in rem lies against the tug under the Rivers and Harbors Act of 1899.

ARGUMENT

I. ADMIRALTY EXTENSION ACT OF JUNE 19, 1948 IS TO BE PROSPECTIVELY CONSTRUED AND HAS NO RETROACTIVE APPLICATION EXCEPT IN THOSE TYPES OF CASES FOR WHICH THE STATUTE EXPRESSLY PROVIDES.

The Act in its entirety is as follows:

> **"§740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.**
>
> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> "In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: PROVIDED, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in

> Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1943 and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act. PROVIDED FURTHER, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 516, 62 Stat. 496." 46 U.S.C.A. 740.

LEGISLATIVE HISTORY

For a long period of time bills had been presented to Congress to extend jurisdiction of admiralty to collisions involving damage to shore structures. In 1931 the courts intimated that Congress had power to pass this type of statute. (See *Taylor v. Lawson* (D.C.S.C. 1931), 50 F. (2d) 165), and with this we do not take issue.

Appellant urges that not only is the Act a purely procedural or remedial statute and is therefore to be retroactively construed, but states also that Congress, by failing to adopt the particular amendment which was suggested by the Attorney General's Department, thereby intended that the Act have retrospective application.

It will be observed that the language which appellant inserts in his brief is only a part of a paragraph included in the Attorney General's letter. That paragraph in its entirety appears as follows:

> "In extending the remedy in admiralty, the right of claimants to proceed against the United States by civil action will be abolished as a result of §421 (d) of the Tort Claims Act of 1946. In order to avoid conflict or uncertainty, it is suggested that the bill

> be amended to indicate that it is to apply only to suits instituted after its adoption. This may be accomplished by insertion, after the word 'that' in line 3, of the words 'hereafter the exercise of'." U. S. Cong. Serv. 1948, p. 1904.

There also appears in the legislative history of the Act very serious doubt as to whether or not a new cause of action is created by the Act. Appellant urges that it does not and again quotes from the Attorney General's letter. However, there is included in the House and Senate report a letter by the Secretary of Navy which includes the following language:

> "Both under the Suits in Admiralty Act and under the Public Vessels Act, passage of the pending bill would create a cause of action in admiralty not hitherto existing." U. S. Cong. Serv. 1948, p. 1901.

Appellant in its brief, obviously employing innuendo, fails to quote the Act in its entirety. The first proviso of the Act in the second paragraph deals with suits against the United States. It is obvious from the paragraph of the Attorney General above quoted that it was this class of cases, namely, suits against the United States, which the Attorney General had in mind in making his suggestion. It is further apparent from reading the proviso that the substance of the suggestion as made by the Attorney General is presently included in the Act, although the identical language suggested by the Attorney General was not used by Congress. The language which Congress employed is that as suggested by the Secretary of the Navy. See U. S. Cong. Serv. 1948, p. 1902.

CASES CITED BY APPELLANT

In support of its contention that the Admiralty Extension Act is to be retrospectively construed, appellant cites a number of cases, see App. Br. pp. 10-11. A careful review of these decisions discloses that they fall into two distinct classes. Either they involve purely procedural changes or they involve jurisdictional changes that do not eliminate trial by jury or available defenses.

Ex Parte Collett (1919), 337 U.S. 55, dealt with the amendment to the venue statute with respect to its application to the Federal Employers Liability Act.

Crane v. Hahlo (1922), 258 U.S. 142, involved a change in New York City's Charter which gave the decision of the municipal body in its award of damages to a property owner for construction of an adequate viaduct, the aspect of finality. It saved and did not eliminate court review but limited the review to fraud or abuse of discretion.

Chase Securities Co. v. Donaldson (1945), 325 U.S. 304, held that a modification of a statute of limitations was to be given retrospective effect. It did not deal with enlargement of jurisdiction nor the elimination of jury trial.

Carpenter v. Wabash Railway Co. (1940), 309 U.S. 23, where the railroad was being operated under section 77 of the Bankruptcy Act, held that a modification of the General Order affecting piority of claims for injury to employees was retrospective.

As to enlargement of jurisdiction appellant cites *Larkin v. Saffrans,* 15 Fed. 147. This was an action in the nature of a declaration in ejectment based by plaintiff

upon a certificate of tax sale made under Acts of Congress for the sale of lands subject to the direct tax and situated within the insurrectionary districts. During the pendency of the suit, the Act of March 3, 1875 (18 Stat. 470) was passed giving the United States Circuit Courts original jurisdiction over various actions including those arising under the laws and constitution of the United States.

True, the court held the act to be retrospective in effect. However, included in the opinion is the following language:

> "That congress has the power to bestow jurisdiction over a pending suit there can be no doubt whatever *if the act says so in terms.*" (Emphasis added.) (P. 148)

The internal revenue laws which were the basis of the tax-title had been passed in 1833. Both parties were citizens of Tennessee. The action was commenced in the Federal courts prior to the passage of the 1875 act. The court permitted the declaration to be amended so as to include the jurisdictional averments as to the Federal Revenue Laws. Elimination of jury trial or available defenses were not involved.

United Wall Paper Factories, Inc. v. Hodges (C.A.A. 2 1934) 70 F (2d) 243 was a case which arose on application for discharge in bankruptcy. Objecting creditor, United Wall Paper Factories Inc. appealed from an order striking specifications on ground that the general order had been amended by the Supreme Court to requiring filing of objections within 10 days after discharge had been granted.

The court states:

> "There can be no doubt that the amendment applied to pending cases; it was a mere change in procedure of far less consequence than the amendments held to apply presently in Lockhart v. Edel, 23 F. (2d) 912 (C.C.A. 4): * * * It is the general doctrine that amendments touching only procedure apply to pending actions." (p. 244)

In support of this doctrine the court cites *Larkin v. Saffrans, supra.*

In *Cobleigh v. Epping Brick Co.* (D.C.N.H. 1949) 85 F. Supp. 862, plaintiff on April 7, 1949, filed a writ of attachment in the state court stating defendant to be a N. H. corporation and $5,000.00 was involved. On May 19, 1949 plaintiff amended the writ showing defendant to be a Maine Corporation. On May 24, 1949 congress amended 28 U.S.C.A. 1446 so as to read "(b) if the case stated by the initial pleading is not removable, a petition for removal may be filed within 20 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, etc. * * * from which it may be first ascertained that the case is one which is or has become removable."

On May 25 defendant filed its petition for removal and the court denied the motion to remand holding the case to be within the terms of the statute.

In *United States v. Kelly,* 97 Fed. 460 (9th Cir. 1899), plaintiff sued United States in District Court to recover a salary or fee. On appeal the case was reversed and remanded to the District Court. Shortly before, Congress had amended the Jurisdiction statutes by adding: "The jurisdiction hereby conferred * * * shall not extend to cases brought to recover fees, salary, etc." leaving those

cases within the jurisdiction of the court of claims. On motion, the mandate to the District Court was recalled and the case dismissed for the reason that the amendment was in effect a repealing clause.

The availability of the statute of limitations to other pending claims of like nature was considered and held to result in harshness in some instances. However, the change in the statute certainly did not operate to eliminate or enlarge the defense of limitation, which incidentally rested with the government and not the claimant to the suit, nor did it modify or eliminate any other available defense or basis for prosecuting the claim.

Insurance Co. v. Richie (1866), 5 Wall. (U.S.) 541 was an action by plaintiff against the internal revenue agent to collect illegally paid taxes. Both were citizens of Massachusetts. Jurisdiction had been conferred by Act of 1864. The court held the Act of 1866 took away that jurisdiction and suit was dismissed for want of jurisdiction.

Although appellant urges that there can be no dispute that, absent a clear expression of contrary intent, a statute conferring jurisdiction will be given retrospective effect, the authorities do not support that position, particularly when elimination of jury trial or defenses such as contributory negligence results.

THE ADMIRALTY EXTENSION ACT IS TO BE PROSPECTIVELY CONSTRUED

Only one decision has been rendered holding that the Admiralty Extension Act of 1948 is to be retroactively construed. *All America Cables & Radio Inc. v. The Dieppe,*

93 F. Supp. 923, was decided in 1950 by the District Court for the Southern District of New York and is cited in appellant's brief. There the vessel, prior to enactment of the statute, dragged her anchors over the marine cables of libelant in Curacao, Netherlands West Indies. The court denied a motion to dismiss the libel holding the statute to have retroactive application. However, the decision does not rest on that point alone for the court states that if, as was indicated, a maritime lien against the vessel existed under Curacao law, such lien could be enforced in the New York court.

It must be borne in mind that at the time of the collision in the case at bar, respondents, insofar as damage to the dike is concerned, had a right to trial by jury and also the right to plead contributory negligence as a bar to any proceeding which appellant may have instituted. If the Admiralty Extension Act is to be retroactively construed, then respondents are deprived of these rights.

It must be further borne in mind that as to shore structures, the Admiralty Extension Act reaches geographically to an area or appurtenance that theretofore was not within the admiralty jurisdiction. In this connection it does not create a new remedy. On the contrary the act specifically states the remedy is to be unchanged and must conform to the principles of law and rules of practice obtaining in admiralty. In effect, the act gives a right to sue in admiralty for injury formerly cognizable only at law. Insofar as the history of admiralty is concerned since the adoption of our Constitution, the right to so sue is new.

It is an elementary rule of construction that statutes are to be prospectively construed unless language in the statute is expressly to the contrary or there is necessary implication to that effect. *Fullerton-Krueger Lumber Co. v. Northern Pac. R.R. Co.,* (1925) 266 U.S. 435, 45 S. Ct. 143; *Brewster v. Gage* (1930), 280 U.S. 327, 50 S. Ct. 115; *Hassett v. Welch* (1938), 303 U.S. 303, 58 S. Ct. 559.

In considering the elimination of available defenses, the theories underlying the reason for the rule are not entirely uniform. Some cases hold that to construe a statute retroactively so as to deprive a suitor of an available defense would render the statute invalid as being violative of the due process clause of the Fourteenth Amendment to the Federal Constitution. Other cases follow the general rule of statutory construction and hold the statute to be prospective unless a retroactive effect is clearly expressed by the enacting body. See *Valleytown Tp. v. Women's Catholic Order of Foresters* (1940 C.C.A. 4), 115 F. (2d) 459.

Congress has from time to time enacted legislation extending admiralty jurisdiction and in so doing has obviously borne in mind the above elementary principles of law.

In passing the Carriage of Goods by Sea Act (1936), 49 Stat. 1207; 46 U.S.C.A. 1300 et seq. it provided expressly for retrospective effect in certain circumstances (see sec. 1314).

The Longshoremen's and Harbor Workers Comp. Act (1927) (44 Stat. 1424), 33 U.S.C.A. 901 included in the amendment of June 24, 1948 an express provision that it

apply only to death or injuries occurring after the effective date of the act.

Other enactments extending admiralty jurisdiction have not included provisions expressing either a prospective or retrospective intent. In all instances the courts have construed them prospectively.

The Act of June 23, 1910 c. 373, (36 Stat. 604) extended admiralty jurisdiction to enforce liens on vessels for supplies and repairs. In *The Saratoga* (C.C.A. 2, 1913), 204 Fed. 952, Cert. Den. 229 U.S. 623, 33 S. Ct. 1050, where the repairs had been made in 1907 the court held the statute must be prospectively construed and permitted no recovery.

The Harter Act, Feb. 13, 1893 (27 Stat. 445) extended admiralty jurisdiction to relieve shipowners from liability for negligent navigation of their vessels if they used due diligence to make their vessels seaworthy. In *Humboldt Lumber Manufacturers Ass'n v. Christopherson* (1896 C.C.A. 9) 73 Fed. 239, it was held that the act had no effect, the loss having taken place in 1889.

In 1886 Congress amended the Limitation of Liability Act of 1851 extending admiralty jurisdiction so as to permit limitation of liability for losses ocurring in connection with vessels navigated on rivers and lakes and further, to include barges and lighters. Act of June 19, 1886, c. 421, (24 Stat. 80), 46 U.S.C.A. 188. In *Chappell v. Bradshaw,* (C. C. Md. 1888) 35 Fed. 923, it was held that the amendment was not to be applied retroactively so as to permit limitation for the loss occurring in 1885.

In 1920 Congress enacted the Jones Act. (41 Stat.

1007), 46 U.S.C.A. 688. This act gave a right of action to seamen for injuries or death occurring in the course of their employment and, by reference to the Employers Liability Act, certain defenses were eliminated. In the extensive litigation which followed the catastrophe to the Steamship Princess Sophia in 1918 on Vanderbilt Reef, Alaska, resulting in the loss of all passengers and crew, it was contended that by reason of the above enactment the shipowners were precluded from limiting their liability for loss of the crew. In the *Petition of Canadian Pac. Ry. Co.* (D.C.W.D. Wash. 1921), 278 Fed. 180 p. 197, the court stated that the act was not to be given retroactive effect.

Pertinent to the issue at bar are the comments of Justice McKenna concerning the Employers Liability Act in *Winfree v. Northern Pacific Ry. Co.,* 227 U.S. 296, 33 S. Ct. 273, holding the statute to have no retroactive application.

> "It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men, and should not be held to affect what has happened unless, indeed, explicit words be used, or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and a more complete remedy. *It, however, takes away material defenses,—defenses which did something more than resist the remedy; they disproved the right of action.* Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its charac-

ter. The court of appeals aptly characterized it, and we may quote from its opinion: *'It is a statute which permits recovery in cases where recovery could not be had before, and takes away from the defendant defenses which formerly were available,*—defenses which, in this instance, existed at the time when the contract of service was entered into and at the time when the accident occurred.' *Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law."* (Emphasis added.)

A commentary on the Winfree case and others dealing with similar problems is found in Crawford, *The Construction of Statutes* (1948), page 586 where it is said:

> "But, as in the case of procedural statutes, oftentimes the right and remedy are so closely connected that any alternative in the remedy may adversely affect the right. Such was true in the Winfree v. Northern Pacific Railway Co. [With citation and a quotation from the opinion substantially as above.]
>
> "Where this is the case, of course, the rule against retroactive operation should naturally be applied, and usually such cases arise where the statute involved creates both the right and the remedy."

To the same effect is the statement found in *Berkovitz v. Arbib & Houlberg,* 230 N.Y. 261, 130 N.E. 288 (cited in Appellants' Brief, page 10): "The word 'remedy' itself conceals at times an ambiguity, since changes of the form are often closely bound up with changes of substance."

In *Turner Terminals, Inc. v. United States* (C.C.A. 5 1950) 177 F. (2d) 844, the terminals company filed libel in personam and in rem for damages to its dock caused by government's vessel when it broke loose from its moorings on May 20, 1946. The libel was filed in May, 1948. In

both lower and appellate courts it was contended, as in the case at bar, that by virtue of the Admiralty Extension Act of June 19, 1948 the court had jurisdiction in admiralty over damage to shore structures and that notwithstanding the previous decisions holding to the contrary (The Plymouth 1866, 3 Wall (U. S.) 20, 18 L. Ed. 125; Cleveland Terminal & Valley R.R. Co. v. Cleveland Steamship Co. (1908), 208 U.S. 316, 28 S. Ct. 414; The Admiral Peoples, 295 U.S. 649, 55 S. Ct. 885) admiralty always had jurisdiction over damages to shore structures, and that by virtue of the retrospective effect which must be given the Extension Act the admiralty court necessarily had jurisdiction of the matter at the time of hearing. Both the District Court and Appellate Court rejected this argument, the latter stating:

> "As shown above, it is clear that in the state of the law prior to June 19, 1948, the court was without jurisdiction of appellant's claim." (p. 846)

In *Vega v. United States,* 86 F. Supp. 293 (Aff'd. (2d Cir., 1951) 191 F. (2d) 921), the court, after acknowledging that—

> "Until the enactment [of the Admiralty Extension Act, 1948] a tort was within the admiralty jurisdiction of the United States courts only if the injury was done on navigable waters, or on some part of a vessel floating on navigable waters but not if it was done on land even by a vessel on navigable waters";

went on to state:

> "Under the well established rule of statutory construction it appears that Congress by making express provisions for retroactive operation of the statute in but one class of cases intended the statute to operate

only prospectively in all other cases. Continental Casualty Co. v. United States, 314 U.S. 527, 533, 62 S. Ct. 398, 86 L. Ed. 426 * * * The legislative history of the statute sustains this conclusion."

While the court in both the *Vega* and *Turner Terminals* cases was concerned only with the prospective effect of the Admiralty Extension Act in cases brought against the United States, it would seem not illogical that the same rule would apply to private litigants. Indeed, it would be unjust to interpret the Extension Act as being prospective as to the United States but retrospective as to private citizens.

II. PRIOR TO THE EFFECTIVE DATE OF THE ADMIRALTY EXTENSION ACT OF JUNE 19, 1948, ACTIONS FOR THE RECOVERY OF DAMAGES TO SHORE STRUCTURES WERE EXCLUSIVELY AT LAW, WHETHER FOR THE RECOVERY OF DAMAGES UNDER THE NAVIGATION STATUTES OR FOR PENALTIES UNDER THE RIVERS AND HARBORS ACT OF 1899.

The pertinent provisions of the statutes to the case at bar are as follows:

"§408. **Taking possession of, use of, or injury to harbor or river improvements.** It shall not be lawful for any person or persons to take possession of or make use of for any purpose, or build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels, thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States, or any piece of plant, floating or otherwise, used in the construction of such work under the control of the United States, in whole or in part, for

the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing such works: PROVIDED, That the Secretary of War may, on the recommendation of the Chief of Engineers, grant permission for the temporary occupation or use of any of the aforementioned public works when in his judgment such occupation or use will not be injurious to the public interest. (Mar. 3, 1899, c. 425, §14, 30 Stat. 1152.)"

"§411. **Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally.** Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this chapter shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment, (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction. (Mar. 3, 1899, c. 425, §16, 30 Stat. 1153.)"

"§412. **Liability of masters, pilots, and so forth, and of vessels engaged in violations.**

"Any and every master, pilot, and engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this title to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of the Army, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this title, or who shall wilfully injure or destroy any work of the United States contemplated

in section 408 of this title, or who shall wilfully obstruct the channel of any waterway in the manner contemplated in section 409 of this title, shall be deemed guilty of a violation of sections 401, 403, 404, 406, 407, 408, 409, 411-416, 418, 502, 549, 686, 687 of this title, and shall upon conviction be punished as provided in section 411 of this title, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408, and 409 of this title shall be liable for the pecuniary penalties specified in section 411 of this title, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof. Mar. 3, 1899, c. 425, §16, 30 Stat. 1153, amended July 26, 1947, c. 343, Title II, §205(a), 61 Stat. 501."

Counsel for appellant, with its confusing and misleading arrangement of authorities, citations and quotations (App. Br. pp. 11-14) seeks to lead this court to believe that for a long period of time prior to the passage of the Admiralty Extension Act of June 19, 1948, the penalty and damage provisions of the Rivers and Harbors Act of 1899 as to shore structures were within the Admiralty jurisdiction. This contention cannot be sustained. It has previously, on numerous occasions, been urged but has consistently been rejected.

In 1865 the Supreme Court first considered the question of jurisdiction of damage to shore structures by ves-

sels. In *The Plymouth,* 3 Wall. (U.S.) 20, 18 L. Ed. 125, the proceeding was in admiralty in rem to recover for damages to a wharf which had been caused by a negligently started fire on the vessel which was berthed there. The court acknowledging the "great care and research" on part of libelant's counsel held nevertheless the cause to be "outside the acknowledged limit of admiralty cognizance over maritime torts."

Other cases followed with variations in the facts and in the type and use of the structure involved.

Admiralty was held to have jurisdiction where a beacon constructed on pile near the river channel was damaged. *The Blackheath* (1904), 195 U.S. 361, 25 S. Ct. 46. And later it was held that admiralty also had jurisdiction of a similarly situated beacon under construction. *Latta and Terry Construction Co. v. The Raithmoor* (1916), 241 U.S. 166, 36 St. Ct. 514.

In 1925 the Supreme Court specifically held that a dike extending from shore, built and maintained for the purpose of deepening the river channel, was not an aid to navigation and consequently an action in rem for damage caused by a vessel was not within admiralty jurisdiction. *United States v. The Panoil* (1925), 266 U.S. 433, 45 S. Ct. 164. This case was the basis of the ruling by 5th Circuit in the *Gansfjord* case, infra. The structure there involved was identical as to locality with respect to channel, nature of the structure and purpose of maintenance as is the structure involved in the case at bar. In *The Panoil* case the court states that the mere fact that the dike's presence may affect the flow of water and ulti-

mately aid navigation did not bring the injury within the admiralty jurisdiction.

Appellant cites a number of cases which it asserts support its contention. In *The Betsy and Charlotte* (1808), 4 Cranch, 443, the statute prohibited vessels from trading at San Domingo. For violations the government, in accord with the statute, made seizure of them on navigable waters. Likewise in *The Scow 6-S* (1919), 250 U.S. 269, the violation of the statute prohibiting dumping in New York Harbor was committed and the scow libeled on navigable waters. It goes without argument that enforcement of a seizure statute or enforcement of a penalty statute, which statutes are directed to things or occurrences on navigable waters, is within the admiralty jurisdiction.

A chronological review of *The Gansfjord* case in its progress through the courts certainly does not lead to the conclusion that proceedings under the Rivers and Harbors Act to recover penalty and damages for injury to a shore structure of the United States, are or have been within the admiralty jurisdiction.

The Gansfjord (D.C. La. 1927), 17 F. (2d) 613, was a case commenced by the United States by libel to recover damages and penalties for injury to a jetty as in the case at bar. On exception to the libel on the ground that it was improperly brought in admiralty the court expressly stated that it was persuaded by the ruling in *The Panoil,* supra, to dismiss the libel. However, it distinguished the proceeding on the basis that it was a statutory penalty proceeding and not one for the recovery of ordinary dam-

ages and overruled the exceptions on the authority of *The Scow 6-S* supra.

Later, in the trial on the merits, *The Gansfjord* (D.C. La. 1928), 25 F. (2d) 736, a jury was tendered but was waived by stipulation. The court there moderates substantially its former opinion stating:

> "In overruling these exceptions I contemplated the libel of information as a proceeding sui generis in character, deriving its sanction directly from the terms of the act in question. I cannot see what the constitutional declaration, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, has to do with the distribution of that jurisdiction by congress as it alone may decide." (pp. 736-7.)

The court further recognized in its opinion the waiver of a jury trial. On appeal, *Aktieselskabet Dampskib Gansfjord v. United States* (5th Cir. 1929), 32 F. (2d) 236, the court disposes of the question of admiralty jurisdiction in unequivocal terms.

> "The injury alleged being to a structure which is to be regarded as land *was not cognizable in a court of admiralty* (citing *The Panoil*). The libel did not purport to be one in admiralty, being filed on the law side of the court, and a jury being waived by written agreement of the parties." (pp. 236-7.) (Emphasis supplied.)

Certioari was denied. 280 U.S. 578, 50 S. Ct. 32.

In *The Barbara Cates* (D.C. Pa. 1936), 17 F. Supp. 241, involving damage to a dike extending into the Delaware River, the court, expressly disagreeing with the Court of Appeals in the *Gansfjord* case, follows the rea-

soning of the District Court but definitely modifies its conclusions by stating:

> "The respondent was bound * * * to claim its right to a jury, if it meant to insist upon it; for a jury trial is not in civil cases a constitutional necessity; a defendant may lose it by inaction."

and

> "I am satisfied that * * * the counterclaim or cross-action could be maintained either at law or in admiralty."

and in support of the above misconception, as to admiralty, the court states:

> "In the present case, even if the libel could be treated as on the law side, I think the claimant would have also clearly waived his right to jury trial." (See page 244.)

From the foregoing it can fairly be assumed the court would also erroneously have entertained a plea of contributory negligence as a complete bar to the proceeding in admiralty had the claimant tendered one.

It is worthy of note that in three or four later decisions, cited in appellant's brief, *The Barbara Cates* was cited but was not followed.

In *United States v. Mount Parnes* (D.C. N.Y. 1941), 1942 A.M.C. 223, the libel was by the United States in Admiralty for damage to a government jetty under the Rivers and Harbors Act. The court, without doing more than citing a few of the leading cases including *The Gansfjord,* supra, and *The Panoil,* supra, as well as *The Barbara Cates,* sustained the exceptions to the libel. Important too is the fact that the government served notice of appeal but later withdrew it.

In *The Dixie* (D.C. Tex. 1941), 39 F. Supp. 395, the United States libeled the vessel under the Rivers and Harbors Act of 1899 to recover damages for injury to a bridge built and maintained by the Department of Agriculture in connection with one of its experimental stations. The claimant of vessel moved for a summary judgment of dismissal which was granted. In previous proceedings the libel by the government was in admiralty under the navigation statutes and the proceedings likewise were dismissed. *The Dixie,* 30 F. Supp. 215.

Again in 1946, the government followed its "usual policy." In *United States v. The Republic No. 2* (D.C. Tex. 1946), 64 F. Supp. 373, the government's attempt to recover in admiralty the penalty for damage to flood gates and guide walls erected by the government at a point where the Intercoastal Waterway crosses the Brazos River, under the Rivers and Harbors Act of 1899, was abruptly halted by exceptions to the libel. Thereafter, but only by agreement of the parties, the cause proceeded on the law side as a civil action.

At least until the passage of the Admiralty Extension Act of 1948, recovery for damage to shore structures, including jettys and dikes, whether for ordinary damages under the navigation statutes or under the penal provisions of the Rivers and Harbors Act, was exclusively within the jurisdiction of the law courts and not in admiralty.

III. LIABILITY OF RESPECTIVE RESPONDENTS AND MISJOINDER.

From the foregoing, the contentions of appellant to the contrary notwithstanding, it follows that the cause of

action for damage to the dike and the cause of action for penalty are causes clearly at law. Moreover, it will be observed that the allegations in the libel are not sufficient to bring the respondents, who have been proceeded against in personam, within the penalty provisions of the Rivers and Harbors Act, there being no wilfullness alleged.

Further, the tug is not liable in rem for damage to the dike under the navigation statutes for reason that the matter is one exclusively at law. It is not liable in rem for damage to the dike under the penalty statutes for reason the matter is exclusively at law and also for reason that, as to the dike, it was not the offending thing. *The Watuppa* (D.C. N.Y. 1937), 19 F. Supp. 493.

It is further apparent that the tug is not liable in rem under the penalty statute for damage to the dredge for the reason that the dredge is not within those types or categories of structures which are defined in Section 408 of the Act.

(a) *Personal Liability for Penalty.*

As has been observed from the opinion in *The Scow 6-S* supra, admiralty under certain given circumstance has jurisdiction to enforce a penalty provision by a proceeding in rem against the offending vessel. The statute must pertain to and the occurrence take place on navigable waters. However, if the action is in personam for the enforcement and collection of the penalty, the proceeding must necessarily be at law because of the Constitutional preservation of the right to trial by jury.

Article II, Section 2 of the Constitution of the United States provides as follows:

"The Trial of all Crimes except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

18 U.S.C.A. 1 classifies offenses as follows:

"Notwithstanding any Act of Congress to the contrary:

"(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

"(2) Any other offense is a misdemeanor.

"(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 62 Stat. 684.

Benedict on Admiralty, Sixth Ed., Vol. 4, p. 184, states the rule:

"If the suit is in personam to collect a penalty from some individual or corporation, the right to a jury trial exists in every instance because the suit should be on the common law side; * * *"

In *U. S. ex rel. Pressprich v. James W. Elwell & Co.* (2nd Cir. 1918), 250 F. 939; Cert. Den. 248 U.S. 564, 39 S. Ct. 8, the above rule is given support, the court stating:

"We think the District Court had no jurisdiction in admiralty over the collection of a penalty by proceedings in personam." (p. 941.)

That case involved the penalty provisions of the Harter Act and although the court by reason of waiver of the jurisdictional objection permitted the matter to proceed on the merits as a *qui tam* proceeding stated the rule

as above set forth citing in support thereof *Virginia etc. Co. v. U. S.*, Fed. Cas. No. 16,773. *McAffee v. The Creole,* Fed. Cas. No. 8,655; and *United States v. The Queen,* Fed. Cas. No. 16,107.

In re Scow No. 36 (1906 1st Cir.), 144 F. 932, the personal liability for penalties under the Rivers and Harbors Act was considered by the court. The opinion states:

> "It is also quite apparent that the law-making power in framing the statute in question had regard to the distinction between the principles which govern admiralty forfeitures in rem and the principles which govern in proceedings to impose a penalty in personam against the owner."

and after quoting from the statute with reference to the use of well-known common law terms, continues:

> "* * * thus unmistakably recognizing and intending tests of criminality which exist under general rules in proceedings against persons charged with misdemeanors;" (p. 935).

Among the reported opinions, we find no other decisions on the question and it is fair to assume that in no other instances has the government sought to enforce a penalty in personam by a proceeding which eliminates trial by jury. It is therefore conclusive that as to Matson, Eckhart and Westport, there can be no personal liability for the recovery of the penalty. Assuredly there is no misdemeanor charged as provided in section 411 of the act and there is no wilfullness charged as required by section 412.

(b) *In rem liability for penalty.*

As to the SS HARDY the libel charges damage and

injury to the dike. There is no charge that the Hardy injured the dredge nor is there any fault charged to her in contributing to the damage to the dredge. The SS HARDY was not arrested nor even named as a respondent in the libel and is therefore not liable for any penalty.

The Tug LOUIS III was arrested. However, she is not charged with being "used or employed" in connection with the damage to the dike under the penalty provisions of the Rivers and Harbors Act. Even though it be argued that the charge of mutual fault as to the dike damage should bring her within the quoted statutory language, she is still not liable in rem in Admiralty, the damage having been done to a shore structure. (See cases supra.)

Nor is the tug liable in rem under the penalty provisions for damage to the dredge. The statute is penal and of course is subject to the rule of strict construction. It specifically provides for and defines the structures coming within the purview of the act. 33 U.S.C.A. 408.

> "It shall not be lawful for any person * * * to injure * * * any seawall, bulkhead, jetty, dike, levee, wharf, pier, or *other work built by the United States,* or any piece of plant, floating or otherwise, *used in the construction of such work* under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters * * * etc." (Emphasis supplied.)

The libel charges that libelant was the owner of the dredge, being a nonpropelled pipeline dredge, and "at all times herein alleged was a floating plant used in the construction of improvements of a navigable river of the United States, to wit: the Columbia River, and was an-

chored outside of and on the Washington side of the main channel, etc." (R. p. 4.)

The libel is void of any allegation that the dredge was being used in the construction of a jetty, dike, levee, wharf, pier, or other work built by the United States, unless it can be said that the deepening of the channel comes within the phraseology "or other work." We urge that it does not. A reading of the further provisions of the statute discloses that the "work" contemplated has reference to structures and the "plant, floating or otherwise" was intended to pertain to such equipment used in connection with the construction of such works. The further provisions of the statute make this clear, i.e.: "boundary marks, tide gauges, surveying stations, buoys, or other established marks, nor remove for ballast or other purposes any stone or other material composing *such works*." (Emphasis supplied.)

Here again we find no decisions holding a dredge anchored in the channel to be included within the objects enumerated in the penalty provisions of the Rivers and Harbors statute. (The dredge had not been digging for a number of days due to high water.) Indeed the dredge, being a float and movable, is governed by the navigation statutes. (Regulations governing lights, signals, whistles, etc. for dredges and pipelines, see Rule 3, 5, 7 and 8 under Section 2, Act of June 7, 1897 as amended.) In *The Dixie* supra, the court applied the strict rules of construction holding the bridge not to be included within the purview of the statute. *The Panoil, supra* held aid of the dike in deepening the channel did not bring the structure within the classification of an aid to navigation.

(c) *In personam liability under the navigation statutes.*

The Admiralty Extension Act having no retrospective effect, it follows that neither Matson, Eckhart, Westport Towboat Co. nor the Tug LOUIS III are liable for damage to the dike under the navigation statutes.

The libel does not charge the Matson Navigation Co., or the Pilot with any fault in connection with the damage to the dredge and they therefore are free from liability as far as dredge damage is concerned.

Westport as owner, operator and claimant of the Tug LOUIS III may properly be held liable in personam for the damage to the dredge and it now is settled without doubt that the tug may properly be proceeded against in rem for such damage. The lower court so held and dismissed as to all parties in connection with the dike damage and dismissed as to Matson and Eckhart in connection with the dredge damage. This ruling we urge is correct and the lower court should be affirmed.

(d) *Misjoinder of Causes and Parties.*

We urge further that the lower court in considering the effect of the apparent misjoinder not only acted correctly but would have been warranted in dismissing the libel in its entirety as to all parties including the Tug and its claimant.

Included in the libel as set forth by the government are two separate and distinct transactions. On one hand is the collision which occurred between tug and dredge and on the other is the collision between the SS HARDY and the dike. In only one respect do the collisions have

anything in common. Both dredge and dike have the same owner, the United States. If the Admiralty Extension Act is to be given prospective application the misjoinder which exists should be considered fatal upon exception.

It is held that "a libelant may not be permitted to join in one action altogether, independent and unconnected causes of action." 2 *C.J.S.* §75, p. 156, n. 49. Also has it been held that a cause of action not maritime cannot be joined with a cause of action maritime. *The St. David* (D.C. Wash.), 209 F. 985. It is obvious that under the navigation statutes as to the dike the cause is in law and non-maritime while as to the dredge the cause is maritime.

Further, with respect to the items of damage the parties are different, Matson and Eckhart doing the damage to the dike and Westport and Tug doing the damage to the dredge. Distinct and separate torts by several persons severally charged cannot be put into the same libel. *Thomas v. Lane* (C.C. Me. 1813), 23 F. Cas. No. 13,902.

If there is a misjoinder it cannot be said that it is not prejudicial to the tug, her claimant and stipulators. The appellant by arresting only the tug and not the SS HARDY seeks to recover all damages and penalties from the tug or its stipulators. It is held that the practice in admiralty is to bring all parties before the Court regardless of the technicalities in pleading," *provided that no party is surprised or prejudiced."* (Emphasis supplied.) See *Standard Oil Co. v. St. Paul Fire and Marine Ins. Co.* (D.C. N.Y. 1945), 59 Fed. Supp. 470, p. 473. *Benedict on Admiralty,* Sixth Ed., Vol. 2, p. 478.

Whether or not the United States as appellant was owner of the SS HARDY, principles of justice whether in law, equity or admiralty demand the naming of the Hardy as respondent and her arrest in the proceedings. It is clear that the failure to do so when combined with the misjoinder both as to causes and as to parties is extremely prejudicial to the tug, her claimant and stipulators.

CONCLUSION

In conclusion appellees submit that the determination of the case at bar is not to rest upon what rights the appellees may or may not have relied upon at the time of the occurrence, but should and must be decided upon the state of the law which existed at the time of the occurrence with consideration to the substantial rights then available. The decree of the District Court should be affirmed.

Respectfully submitted,

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